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INTRODUCTION

Enough time has passed since the death of William H. Rehnquist that we are able to evaluate the Court that bore his name with a sense of historical detachment. Shortly after the Chief Justice's death, a number of articles appeared that addressed the jurisprudence of the Rehnquist Court. Entire symposia have now taken stock of the legal changes wrought during Rehnquist's tenure. By and large, these articles have identified data which support the assessment that, in the area of federalism, the Rehnquist Court was aggressive, radical, and ideological.[4]

At the same time, the radicalism of the Rehnquist Court in the area of federalism is, by now, conventional wisdom, and the narrow focus of these numerous studies on the issue of federalism has obscured notable features of the Rehnquist Court's voting behavior in other distinct domains. In the analysis presented here, we try to correct this narrow focus.

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[4] Representative works include: Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665 (2006); THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz ed., Hill & Wang 2002). Perhaps the most comprehensive analysis is contained in Lori A Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43 (2007).

We collected data from the last ten years of the Rehnquist Court. This data demonstrates a predictable contrast between the federalism cases, on the one hand, and individual rights cases on the other. In the aggregate, the data reveals that virtually no members of the Court, including those who most vocally express unease concerning the institution of judicial review, adhere to a consistent methodology in constitutional adjudication. At the same time, there *is* a consistency in the inconsistency of individual Justices—what might be called a "consistent inconsistency." This consistent inconsistency makes it possible to predict a Justice's individual votes with a high degree of confidence.

Much of the recent scholarship that has analyzed voting among the Justices on the Rehnquist Court has been extraordinarily comprehensive.[5] In our view, the lacuna in the current scholarship is not a shortage of data. Rather, the two limitations in the current scholarship are that (1) there has been no statistical analysis of the Justices' voting patterns, and (2) there has been no significant effort to employ statistical analysis to predict judicial behavior. In this article, we seek to cure these limitations. Using statistical analysis of the Justices' votes in more than 150 cases, additional support is provided to the well-trod claim that the Supreme Court, under Chief Justice Rehnquist's stewardship, was highly activist in the body of constitutional cases that turned on issues of federalism. In addition, using further analysis, the Rehnquist Court is also shown to have been notably activist in certain other domains, including cases raising claims of religious liberty.

I. DEFINITIONS AND NOMENCLATURE

At the outset, one should acknowledge the obvious truth that the title of this Article makes no sense. It is now widely known

[5] *See, e.g.*, THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (University of Chicago Press 2004) (positing conservative influences of Rehnquist Court parallel liberal influences of Warren Court in terms of judicial activism); Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301 (2002) (discussing perceived "federalism revolution" in the Rehnquist Court's treatment of federal action); Ringhand, *supra* note 4 (presenting empirical analysis of Supreme Court Justice voting behavior during the Rehnquist Court).

that there is really no such thing as "judicial activism."[6] Scholars on the left, the right, and in the center use the term as if it is meaningful,[7] but it is not. Rather than describing a particular *mode* of judicial analysis, the term "judicial activism" refers to a judicial outcome to which someone (namely the person using the term) generally objects. Hence, a judicial activist is a judge who, in the eyes of her critics, decides cases the wrong way. Although the epithet "judicial activist" is often followed by a claim that judges should not "legislate from the bench" and that they should "interpret rather than create" law,[8] these claims are diversionary and merely rhetorical. Such claims are diversionary and rhetorical since everyone agrees that judges should interpret rather than legislate, and that is what all judges purport to be doing. If an interpretation is wrong, however, it does not automatically transform into something other than an interpretation. In short, characterizing a judge as a judicial activist does not reveal anything about that judge's methodology.

[6] *See generally* Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441 (2004) (defining "judicial activism" via comprehensive historical overview of term).

[7] *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1139-40 (2002) (explaining popularity of making "conservative judicial activism" accusations against Rehnquist Court as a function of political "payback" for conservative criticism of Warren Court); *see also* Randy E. Barnett, *Foreword: Judicial Conservatism v. a Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 273-76 (1987) (positing that judicial conservatives endorse judicial restraint while judicial liberals prefer a more activist role for the judiciary); Steven G. Calabresi, *2005 Survey of Books Related to the Law: The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1081 (2005) (reviewing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (Princeton University Press 2004) and challenging Professor Barnett's claim that judicial activism stems from libertarian judicial originalism); Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 118-19 (1987) (arguing that a moderate judicial process between ideological extremes of activism and restraint would best serve the Constitution); Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) (proclaiming "judicial activism" void of any real meaning in that it is exclusively used to criticize those in ideological opposition); Earl M. Maltz, *The Prospects for a Rival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 630-31 (1990) (arguing that both political viewpoints can be validly associated with judicial activism).

[8] For a collection of such assertions from former President Ronald W. Reagan, President George W. Bush, Supreme Court Justice Antonin Scalia, and others, *see* Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199, 202-03 & n.27 (1999) (reviewing WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (Dutton 1991)).

Because the phrase "judicial activism" means nothing, it cannot be coherently described, and because it cannot be coherently described, it cannot be measured empirically. Consequently, this Article does not attempt to measure it. Nor, for that matter, have other recent articles that have addressed judicial behavior truly attempted to measure judicial activism, even as they employ this phrase.[9] Therefore, what is actually studied in this and other scholarly articles is judicial *deference*, not judicial activism.[10] Deference refers to the tendency of judges to defer to the political branches (i.e., the legislative and the executive). Here, deference is measured simply by counting how often courts strike down acts of the legislature. A judge that upholds the action of a political branch against a constitutional challenge brought by an individual (or group of individuals) is being deferential; a judge who strikes down the action of the political branch is being non-deferential.

Of course, even though the term "judicial activism" is generally devoid of meaning, there is an obvious connection between what is referred to as judicial deference and what people ostensibly mean when they use the phrases "judicial activist" or "judicial activism." The connection has to do with judicial legitimacy. When a critic says that a judge is an activist or that a decision exhibits judicial activism, what the critic ordinarily means is that the judicial action is *illegitimate*—that the judge did something he or she ought not to have done.[11] In the context of constitutional adjudication, where a court is declaring an act of the executive or the legislature (federal, state, or other) unconstitutional, "illegitimate" ordinarily means that the court has wrongly thwarted

[9] For a discussion in the context of the Terri Schiavo case, *see* Edward A. Hartnett, *The Schiavo Case: A Symposium: Congress Clears Its Throat*, 22 CONST. COMMENT. 553 (2005).

[10] For an earlier effort to measure deference in a more limited context, but using essentially the same approach we have used, *see generally* Nicholas S. Zeppos, *Deference to Political Decision Makers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296 (1993). Using data compiled by Professor William Landes and Judge Richard Posner, Professor Zeppos studied Supreme Court deference in the period from 1938 to 1992. *Id.* at 303-04. He did not employ the discrete models of constitutional adjudication that we use, nor was he interested in examining the voting behavior of individual Justices. *Id.*

[11] *See* Young, *supra* note 7. This Article enumerates various categories of judicial activism. Although elucidating the types of mistakes judges can make is beyond the scope of this Article, the two most common errors are identifiable: (1) treating as authoritative a text that ought not to be treated as authoritative, or (2) misreading a text that has been properly treated as authoritative.

the will of the majority[12]—that the court has substituted its will or judgment for the action of the legislature, the immediate representatives of the people. To take perhaps the most famous example in constitutional history, when critics argue that the decisions in *Roe v. Wade*[13] and its progeny exemplify judicial activism, the essence of the criticism is that the *Roe* line of cases illegitimately defies the political majority's efforts to place some restrictions on the right to choose an abortion. Legitimacy is therefore closely related to the so-called counter-majoritarian difficulty.[14] "Judicial activists" render decisions that are illegitimate because they wrongfully thwart the will of the majority by imposing their own beliefs on the populace.[15] Once the connection between the phrase "judicial activism" (or "activist") and decisions that thwart the will of the majority is acknowledged, the concept can then be measured empirically. Even though "judicial activism" does not describe a discrete methodology, the capacity exists to tally up the instances where judges overturn acts of the political majority, and the results of that calculation produce a body of data.[16]

[12] In a series of articles, Barry Friedman has said probably everything there is to say about this point. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH L. REV. 577 (1993). "The countermajoritarian difficulty posits that the 'political' branches are 'legitimate' because they further majority will, while courts are illegitimate because they impede it." *Id.* at 630. *See also* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

> Deference to other brands of government is typically the frame for evaluating the work of constitutional judges, and apparent anxiety over the legitimacy of judicial review has begun to produce increasingly creative (albeit somewhat stretched) descriptions of both democracy and judicial review. Such scholarship commonly assumes, without argument, that legislative bodies are democratically legitimate, and that most of what judicial review is aimed at is overturning the decisions of such bodies.

Id. at 165-66. Friedman also notes a book regarding reconciling judicial review with the workings of democratic government, stating that according to the author, "when the Supreme Court invalidates the work of an actor who is subject to the electoral process, the Court 'exercises control, not in behalf of the prevailing majority, but against it.'" *Id.* at 201 (*quoting* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17 (Bobbs-Merrill 1962)).

[13] 410 U.S. 113 (1973).

[14] BICKEL, *supra* note 12, at 16 (discussing how "the root difficulty is that judicial review is a counter-majoritarian force in our system").

[15] *See supra* note 7 and accompanying text. The types of mistakes judges can make that lead to an illegitimate outcome are hardly the sole province of so-called judicial activists, but amplifying that obvious observation is beyond our present scope.

[16] *See, e.g.*, Ringhand, *supra* note 4, at 44. This article states that that examining voting records of individual justices provides specific, empirical data on how justices used judicial review. *See also* Cross & Lindquist, *supra* note 4, at 1701. "A commonly invoked measure of judicial activism is the Court's willingness to invalidate statutes. While this is

Notably, however, not every judge who votes to overturn a law on constitutional grounds earns the appellation "judicial activist." As the data reveals, for example, Chief Justice Rehnquist, as well as Justices Scalia and Thomas, voted to overturn many laws supported by a political majority during the years examined in this Article, yet one rarely hears them referred to as judicial activists. Hence, equating "judicial activist" with "a judge who votes to overrule the majority" is too crude a measure to be useful. The reason is because constitutional adjudication, which is the context where these phrases arise, is not a singular phenomenon.

In physics, when confronted with an intractable problem, the best approach might be to make the problem bigger. In law, however, or at least when addressing intractable problems of constitutional theory, a more sound approach is to make the problem smaller. For that reason, judicial deference on the Rehnquist Court is examined by taking a single problem and dividing it into three subsets. In this respect, the analysis contained in this Article departs from recent scholarship.[17] The analysis begins by describing the shrinking of the problem, and then by presenting the data.

A. Defining Deference

In the context of this paper, deference is defined as "deference to the political majority." A deferential judge permits the action of the majority to stand. A non-deferential judge strikes down the action of the majority. The will of the political majority might be either manifested by executive or legislative action, or exerted directly by the people. It will depend on the context and which agency of government is acting. At times, the relevant government will be the federal government; at other times, it will be a state government or a political subdivision of a state government. However, for purposes of measuring a judge's deference, it does not matter which agency of the government has acted; it matters only that *some* agency of the government has

not a perfect or complete measure of activism, it surely has a rough accuracy, because striking down legislation is a clear flexing of judicial power at the expense of another branch of government." *Id.*

[17] The most notable study this analysis departs from is Professor Lori A. Ringhand's study, where she quantifies judicial activism. Ringhand, *supra* note 4.

acted, and that only *one* government agency has acted, such that the government action can be presumed to represent the will of the majority.

At a relatively high level of generality, there is no dispute about the fundamental soundness of judicial review. Since *Marbury v. Madison*,[18] and probably even before,[19] judicial review has been viewed as appropriate. Indeed, in any so-called higher law system, where "higher law" refers to a body of rules or principles that are not subject to alteration by a mere majority vote, there must be some institution that enforces the higher law when it is perceived to be at variance with a measure enacted by the majority.[20] In most higher law regimes, this institution is the judiciary. The same is true in the United States, which is obviously a higher-law system. Consequently, the question in contemporary constitutional theory is not *whether* judicial power exists to thwart the will of the majority, but rather when and how it ought to be exercised.

This examination of the Rehnquist Court reveals that Justices who trumpet the virtue of deference in one context are heedless to deference in other contexts. Conversely, other Justices who dismiss the importance of deference in certain instances embrace it tightly in others. It is possible that these perturbations are unprincipled, but it is also possible there is an explanation for these seeming irregularities or inconsistencies. The data reveals manifest patterns, enabling one to predict outcomes in particular cases with a high degree of confidence.

In the study's measurement of judicial deference, three different categories of constitutional adjudication were distinguished. These categories were not invented. Rather, they exist in constitutional law as an epistemic matter. However, although the categories are not created, this Article departs from other examinations of the Rehnquist Court to suggest, perhaps for the first time, that these categories are germane to assessing and measuring judicial deference.

[18] 5 U.S. 137 (1803).

[19] *See generally* William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005) (analyzing judicial review case law in the United States pre-*Marbury*).

[20] *See generally* SANFORD LEVINSON, CONSTITUTIONAL FAITH 9-53 (Princeton University Press 1988).

All overarching constitutional problems—including problems of standing, justiciability, jurisdiction, and legitimacy—have several iterations. How a given issue should be resolved in one context may not dictate how it should be resolved in another. For example, whether a party has suffered an injury sufficient to confer standing to raise a First Amendment free speech challenge may not be measured the same way as when a plaintiff raises a claim under the liberty clause of the Fourteenth Amendment.[21] To date, however, the debate in American jurisprudence, as represented both in case law as well as academic commentary, has approached the legitimacy problem as a unitary one. The debate has assumed that constitutional adjudication is a singular phenomenon.[22] Our examination of the Rehnquist Court's jurisprudence alters that assumption. Constitutional adjudication is treated in this Article as three things, not one, and it is shown that any reliable measure of judicial behavior must be sensitive to these three distinct iterations. Because of these iterations, it is possible for a judge to be deferential in one area, and non-deferential in another. In turn, this truth suggests that an aggregate measure of deference is less illuminating than a more nuanced examination of deference in discrete contexts.

Problems related to legitimacy can arise in at least three distinct contexts: rights model adjudication, separation of powers litigation, and federalism cases. Each is briefly discussed in the sections that follow.

[21] In the First Amendment context, the importance of the chilling effect has the consequence of expanding the meaning of "injury" sufficient to confer standing. *Compare* Cantwell v. Connecticut, 310 U.S. 296 (1940), which describes standing in view of asserted over-breadth and vagueness in First Amendment challenges *and* NAACP v. Button, 371 U.S. 415 (1963), which highlights standing in view of its chilling effect, *with* City of Los Angeles v. Lyons, 461 U.S. 95 (1983), which uses standing to challenge a non-imminent use of a chokehold *and* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), which explains standing to enforce federal environmental regulations.

[22] This is the case in classic literature, including, for example, BICKEL, *supra* note 12; Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (Harvard University Press 1980). It is also true in contemporary literature; some notable examples include PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (Oxford University Press 1982); LEVINSON, *supra* note 20; Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373 (1998); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). There are some prominent exceptions, including, *e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

B. The Rights Model

Rights model adjudication ("RMA") is the most familiar form of constitutional adjudication. In certain respects, it is the quintessential constitutional adjudication. When citizens imagine the courts enforcing constitutional law, they typically imagine rights model adjudication. For example, *Roe v. Wade* is a rights model case.

Rights model adjudication takes the form of an individual (or group of individuals) versus the state. The logical structure of these cases is always the same: individual versus the state, which translates into minority versus majority. The state can be the federal government, a state or local government, or some combination thereof. In rights model adjudication, the state exercises some power, either executive or legislative (or, very rarely, judicial), and an individual (or group of individuals) argues that the exercise of state power has infringed one or more of their rights.

So-called legitimacy concerns are at their apogee in the context of the rights model, precisely because the premise of rights model adjudication is conflict between the majority and a minority. That is, the very reason these cases arise is that the majority acts, either through the executive or the legislature, and the minority is injured as a result of the majority's action. Furthermore, the minority argues, that it has rights that prevent the majority from acting as it has. This majority-minority conflict is present, by definition, in all rights model cases. Examples of this dynamic are commonplace: the majority prohibits the minority from voting or registering to vote;[23] the majority criminalizes sexual conduct engaged in by members of the minority;[24] the majority prevents terminally ill patients from receiving physicians'

[23] *E.g.*, Reynolds v. Sims, 377 U.S. 533, 537-40 (1964). Residents, taxpayers and voters filed a suit challenging the apportionment of the Alabama Legislature. *Id.* The complaint alleged their rights were deprived under the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment. *Id. See also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 664-66 (1966). Here Virginia residents brought a suit alleging that Virginia's poll tax was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

[24] Lawrence v. Texas, 539 U.S. 558, 562-64 (2003) (questioning the validity of a Texas statute making it a crime for two people of the same sex to engage in certain sexual conduct).

assistance in terminating their lives;[25] the majority bars restaurants from selling foie gras.[26] In each of these cases, the minority challenges the majority's action, arguing that it violates their rights under the Constitution.

When a court sides with an individual in rights model adjudication (RMA), the court is, by definition, thwarting the will of the majority. If a judge says that lesbians can marry one another, he is ruling that the majority's efforts to preclude such unions are unconstitutional.[27] Similarly, if a judge says children cannot have organized prayer during high school events, he is nullifying the majority's efforts to permit such prayer.[28] Rulings like these give rise to charges that judges who rule for individuals in RMA are imposing their own values on the polity, or "legislating" from the bench. Such rulings generate charges of judicial "activism." No single principle or methodology can describe each of these cases. What they do have in common, however, is that in all RMA cases, the judges have overruled actions of the majority; in all of them, the judges have been non-deferential.

C. *Separation of Powers*

The second type of constitutional adjudication involves conflict not between the majority and a minority, but between (or among)

[25] Washington v. Glucksberg, 521 U.S. 702, 705-08 (1997). The state of Washington brought an action against a group of doctors for "promoting a suicide attempt." *Id.* The question before the Court was whether Washington's "prohibition against 'causing' or 'aiding' a suicide offend[ed] the Fourteenth Amendment to the United States Constitution." *Id.*

[26] *See Angry Chefs Cook up Lawsuit Over Foie Gras Ban*, MSNBC, Aug. 22, 2006, http://www.msnbc.msn.com/id/14472971/. "Chefs have called the ban an attack on their right to choose what kinds of dishes they want to create and an attack on the rights of consumers." *Id.*

[27] *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 972 (Mass. 2003) (ruling in favor of same-sex marriage under the auspice of a Massachusetts Constitution that serves to limit the state legislature from imposing a "caste-like system" with respect to such unions); *see also* Baker v. State, 744 A.2d 864, 867 (Vt. 1999) (concluding, similarly, that a Vermont law prohibiting same-sex marriages runs afoul of the constitutional guarantees and societal interests to which the state legislature must conform, and does not endorse nor mandate an understanding of marriage as one limited to that between a man and a woman).

[28] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (affirming a purported violation of the Establishment Clause on the grounds that the "policy is . . . on its face . . . an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.").

branches of government. Unlike RMA, separation of powers ("SOP") litigation does not invariably involve a majority-minority dynamic. This important fact makes deference difficult, if not impossible, to precisely measure in SOP litigation. Further, the difficulty of assessing deference in this context explains why charges of "judicial activism" are rarely heard in the aftermath of SOP cases, even SOP cases of rather high profile. If legitimacy concerns are at their most intense in RMA, they are at an ebb in SOP cases.

The twin concepts of deference and legitimacy have only a muted application to SOP litigation because SOP cases can arise in diametrically opposing scenarios. They might arise when two (or more) branches of the federal government work in unison, or they might emerge when two (or more) branches of government are in opposition. In neither context, however, is there an obvious tension between the majority and the minority. The reason, of course, is that—in theory—both the Executive and the Congress represent the majority. For at least a generation, this theoretical assumption—that the political branches in fact represent majority will—has been known to be false.[29] Nevertheless, the so-called counter-majoritarian difficulty and, indeed, virtually all problems of constitutional theory, assume that it is true.

In SOP litigation, a minority of the cases *do* involve a majority-minority conflict—namely, those where the President and Congress act jointly and have their joint action rebuffed by the judicial branch—but most cases do not. The classic SOP conflict, for example, *Youngstown Sheet & Tube Co. v. Sawyer*,[30] involved a case where Congress and the President were at loggerheads.[31] Most contemporary SOP disputes likewise manifest conflict (rather than cooperation) between two or more branches. Congress and the President (or the President and the judiciary) did not act jointly, for example, when President Truman seized the

[29] *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (Yale University Press 1975) (1974) (arguing that the principal motivation of legislators is re-election); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (Yale University Press 1989) (discussing the history and nature of democracy and suggesting how it must change in the future); *see also* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 13-14 & n.52 (1990).

[30] 343 U.S. 579 (1952).

[31] Actually, the Court assumed they were at loggerheads, though this assumption may well have been infirm, a point beyond our present scope.

steel mills,[32] when President Nixon invoked a claim of executive privilege,[33] or when President Clinton claimed immunity from civil suit for actions taken prior to his Presidency.[34] In this common scenario, where branches of the federal government disagree with one another, there is no plausible way to conceive of the conflict in terms of majority versus minority, because there is no way to determine which of the two branches more accurately represents the majority will. For example, when Congress insists that the War Powers Resolution applies to a certain conflict, while the President insists that it does not,[35] which point of view represents majority will? There is no coherent theoretical answer to this question, which in turn implies that neither answer necessarily contradicts the majoritarian viewpoint.

On the other hand, it is true that in a great deal of contemporary SOP litigation, Congress and the President have acted together. For example, the legislative veto[36] and the line-item veto[37] are cases where the two branches have acted jointly. Nevertheless, even in these cases, viewing the dispute in terms of majority versus minority is complicated to the point of impossibility. Where Congress seeks to exercise a legislative veto, or where the President seeks to execute a line-item veto, one political branch has been *authorized* by the other to act, but the *actions* of the two branches are nevertheless in contrast. As a result, there is no obvious or apparent way to view the resulting litigation as a majority versus minority dispute, because one democratic branch is purporting to overrule the decision of another.

Therefore, because judicial review in SOP cases typically does not raise legitimacy concerns, this assessment of the Rehnquist Court does not take SOP cases into account in analyzing the various Justices' deference to political institutions.

[32] *Youngstown*, 343 U.S. at 579.

[33] United States v. Nixon, 418 U.S. 683, 686 (1974).

[34] Clinton v. Jones, 520 U.S. 681, 686-87 (1997).

[35] Crockett v. Reagan, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). (holding that the issue presented a nonjusticiable political question).

[36] Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 924-25, 928 (1983) (discussing the constitutionality of the legislative veto of the Attorney General's recommendation for suspension of an alien's deportation under Immigration and Nationality Act).

[37] Clinton v. City of New York, 524 U.S. 417, 421-23 (1998) (challenging the constitutionality of the Line Item Veto Act after the President exercised his authority under the Act by cancelling one provision in the Balanced Budget Act of 1997 and two provisions in the Taxpayer Relief Act of 1997).

D. Federalism

Finally, the third type of constitutional adjudication involves questions relating to the allocation of power between state governments and the federal government. Whereas in SOP litigation a small minority of the cases arguably do involve a majority-minority conflict (namely, those where the President and Congress act jointly, and the judicial branch then overturns that joint action), in the federalism context, the opposite is the case. Although a small number of cases arise where the federal government's interest is at odds with that of one or more states,[38] most contemporary federalism cases reflect an alignment of federal and state governments. In other words, most contemporary federalism cases find the state and federal sovereigns in agreement. This means, of course, that judicial action striking down these laws implicates the same majority-minority dynamic that is also present in RMA.

For example, in *United States v. Lopez*, which struck down a federal law that prohibited gun possession within 1,000 feet of a school, the party challenging the federal legislation was not a state government that believed that the federal government had intruded on its sovereignty, but rather an individual.[39] The state governments supported the federal legislation. Similarly, in *United States v. Morrison,* which struck down a federal law that provided a private right of action to women who were victims of sexual assault, the party challenging the statute was not a state (or group of states), but was instead an individual.[40] Again, the state governments supported the federal law. Although these are federalism cases, in the sense that the doctrinal basis of the decisions has to do with the constitutionally prescribed allocation of power between the state and federal governments, they involve the majority-minority dynamic for precisely the same reason that the RMA cases do: because the majority's understanding of the

[38] *E.g.*, New York v. United States, 505 U.S. 144 (1992) (challenging provisions of Low-Level Radioactive Waste Policy Amendments Act of 1985); Gonzales v. Oregon, 546 U.S. 243 (2006) (upholding Oregon law permitting doctors to prescribe medicine to terminally ill patients which would permit those patients to terminate their lives); Gonzales v. Raich, 545 U.S. 1 (2005) (ratifying congressional power to prohibit medical marijuana use, and thereby overrule state law that permits or authorizes such use).

[39] 514 U.S. 549 (1995).

[40] 529 U.S. 598 (2000).

constitutional principles, as reflected in its action, is overruled by the judicial branch.

Whereas most SOP disputes cannot be evaluated in terms of majority versus minority, and therefore cannot be re-characterized into RMA terms, most federalism cases *do* involve the overruling of the majority, and therefore *can* be re-conceptualized in RMA terms. Occasionally, the interests of state and federal sovereigns are in tension with one another, and under such circumstances, federalism cases, like most SOP disputes, cannot be recast in RMA terms. However, because the interests of state and federal governments are typically aligned in modern federalism cases, a judicial decision that strikes down the legislative enactment favors the minority over the majority. This raises precisely the same legitimacy concerns present in the typical RMA case.[41] Therefore, federalism cases are included in this assessment of the Rehnquist Court's deference to political institutions.

II. MEASURING DEFERENCE AND PREDICTING JUDICIAL BEHAVIOR

Approximately 170 cases were examined between 1995 and 2005, *i.e.*, from the October 1994 Term through the end of the October 2004 Term, which was the last full term of the Rehnquist Court. Cases are analyzed based on two principal criteria: the perceived importance of the case, and the vote in the case. Generally, cases were not examined if they were not widely regarded as both significant and non-unanimous.[42]

[41] Of course there are exceptions. When the state (or group of states) challenges the federal government's action, it is impossible to re-characterize these cases as majority versus minority disputes because there are two "majorities" involved: the state majority and the federal majority. In a future article, we argue that this category of federalism cases should be deemed nonjusticiable on the grounds that there is an adequate political solution.

[42] In Appendix 2, an alphabetical listing of each of the cases contained in this analysis is provided. Our selection of cases coincides largely with the cases identified by Linda Greenhouse of *The New York Times* as the Term's most important cases. However, Greenhouse's analysis regularly examines a number of statutory cases, whereas our focus is exclusively on constitutional cases. *See* Linda Greenhouse, *Roberts Is at Court's Helm, but He Isn't Yet in Control*, N.Y. TIMES, July 2, 2006, at 11; Linda Greenhouse, *The 2004–2005 Session: Court's Term a Turn Back to the Center*, N.Y. TIMES, July 4, 2005, at A1; Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 5, 2004, at A1; Linda Greenhouse, *The Supreme Court: Overview; In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1; Linda Greenhouse, *Court Had Rehnquist Initials Intricately Carved on Docket*, N.Y. TIMES, July 2,

Nearly ninety percent of the cases in the data-set are rights model cases, and just over ten percent are federalism cases. The rights model cases, however, cover a very broad range, encompassing criminal procedural rights, Fourteenth Amendment due process rights, First Amendment free speech rights, First Amendment religion rights, Eighth Amendment issues, habeas corpus questions, and jurisdictional as well as justiciability issues. Because the RMA cases cover such broad terrain, viewing these cases as a whole can be misleading. For example, a Justice who might be highly deferential in cases raising due process challenges to government action, for instance Justice Scalia, who earns a perfect deference score of 100 percent in this category, might be far less deferential in other seemingly related contexts, for example Justice Scalia's deference score of zero in free exercise cases. Accordingly, although aggregate data is presented for RMA cases below, issue-by-issue voting tallies for these cases are also presented, and the model used to predict judicial behavior disaggregates the RMA cases.

The Rehnquist Court is commonly stated to have had its most significant impact in reshaping federalism doctrine. The data bears out this assessment. Chief Justice Rehnquist himself was non-deferential in forty-seven percent of the federalism cases. In this context, "non-deferential" means that the Justice voted against a measure enacted by Congress (and, in nearly all the cases, also supported by the states). The highest figure for non-deference, perhaps somewhat surprisingly, was Justice Kennedy, with a non-deference score of seventy-four percent. Justices Scalia and Thomas were non-deferential sixty-three percent of

2002, at A1; Linda Greenhouse, *In Year of Florida Vote, Supreme Court Also Did Much Other Work*, N.Y. TIMES, July 2, 2001, at A12; Linda Greenhouse, *The Nation: Split Decisions; The Court Rules, America Changes*, N.Y. TIMES, July 2, 2000, at 41; Linda Greenhouse, *The Nation: Supreme Court; The Justices Decide Who's in Charge*, N.Y. TIMES, June 27, 1999, at 41; Linda Greenhouse, *Supreme Court Weaves Legal Principles From a Tangle of Litigation*, N.Y. TIMES, June 30, 1998, at A20; Linda Greenhouse, *Benchmarks of Justice*, N.Y. TIMES, July 1, 1997, at A1; Linda Greenhouse, *Legacy of a Term—A Special Report; In Supreme Court's Decisions, A Clear Voice, and a Murmur*, N.Y. TIMES, July 3, 1996, at 1; Linda Greenhouse, *The Nation: Gavel Rousers; Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, at 1. This statutory/constitutional distinction is responsible for the majority of the discrepancies between our data-set and the cases identified by Greenhouse. Hence, of the 169 cases we examine, only fifty-five are not included in Greenhouse's analysis. Of those fifty-five, twenty-four are habeas corpus cases; another seven raise Eleventh Amendment issues.

the time. At the other end of the spectrum, Justice Ginsburg was deferential in the federalism cases seventy-four percent of the time. Justices Stevens, Souter, and Breyer were deferential sixty-three percent of the time.

In the federalism context, therefore, the Justices who were the least deferential to the political majority were Justices Kennedy, Scalia, and Thomas, and Chief Justice Rehnquist. The Justices who were most likely to defer to the political branches were Justices Ginsburg, Stevens, Souter, and Breyer.

In RMA, the numbers are predictably different. In First Amendment cases that presented free speech issues, Chief Justice Rehnquist and Justice O'Connor were the most deferential, with deference scores of sixty-five percent. Justices Kennedy and Souter were least deferential, with a deference score of twenty percent, and Justice Stevens was nearly the same, with a deference score of twenty-five percent. Similarly, in First Amendment cases raising establishment clause concerns, Chief Justice Rehnquist was deferential eighty percent of the time, followed by Justice Scalia at seventy-eight percent and Justice Thomas at seventy percent. Justice Souter, on the contrary, was deferential only twenty percent of the time, followed by Justices Stevens, Ginsburg, and Breyer, who each had deference scores of thirty percent.

Overall, in rights model cases, the line-up of the Court as a whole is nearly the mirror image on deference scores as it is in the federalism cases. The following chart summarizes the data presented in greater detail in the following section.

Overview of total deference scores:

Justice	**Deference (non-deference) percent in RMA / rank**	**Deference (non-deference) percent in federalism / rank**
Rehnquist	71 (29) / 2	53 (47) / 5
Stevens	25 (75) / 9	63 (37) / 2 (t)*
O'Connor	55 (45) / 4	42 (58) / 6
Scalia	72 (28) / 1	37 (63) / 7 (t)
Kennedy	49 (51) / 5	26 (74) / 9
Souter	28 (72) / 8	63 (37) / 2 (t)
Thomas	68 (32) / 3	37 (63) / 7 (t)

Ginsburg	33 (67) / 7	74 (26) / 1
Breyer	38 (62) / 6	63 (37) / 2 (t)

*(t) tied for that particular ranking

The data confirms what has been intuitively assumed by a number of commentators: that the issue of deference is not two-dimensional, but instead, a judge's deference score depends intimately on the type of case being adjudicated. For example, Justice Ginsburg ranks first in deference in the federalism cases but seventh in the rights model cases; Justice Scalia, on the other hand, ranks first in deference in the rights model cases but seventh in the federalism cases. Thus, the same Justices who are most deferential in the rights model context—and who most vocally complain that the non-deferential Justices are illegitimately interfering with the will of the political majority[43]—are among the least deferential to the political majority in the federalism context. Conversely, the same Justices who are most willing to defer to the political majority in the federalism cases are among those least willing to do so in the rights model cases.

The statistical analysis presented below reveals something further: that there is a nuance even within the rights model cases—that is, a given Justice's deference score varies from one type of RMA case to the next. There is no apparent methodological justification for this variation. Therefore, it tends to suggest that a given Justice's deference in RMA cases reflects that Justice's assessment of the comparative importance of the individual right asserted, versus the apparent state interest in abridging it.

[43] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 602-03 (2003) (Scalia, J., dissenting). "[T]he Court has taken sides in the culture war, departing from its role . . . as neutral observer . . . . So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream.'" *Id. See also* Atkins v. Virginia, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting). "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." *Id.*

III. DEFERENCE TABLES FOR INDIVIDUAL ISSUES

Issue: 11th Amendment (4 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	50.0%	50.0%
Ginsburg	25.0%	75.0%
Kennedy	75.0%	25.0%
O'Connor	75.0%	25.0%
Rehnquist	75.0%	25.0%
Scalia	75.0%	25.0%
Souter	50.0%	50.0%
Stevens	25.0%	75.0%
Thomas	50.0%	50.0%

Issue: 14th Amendment – Due Process (14 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	21.4%	78.6%
Ginsburg	42.9%	57.1%
Kennedy	57.1%	42.9%
O'Connor	42.9%	57.1%
Rehnquist	78.6%	21.4%
Scalia	100%	0.0%
Souter	21.4%	78.6%
Stevens	21.4%	78.6%
Thomas	92.9%	7.1%

Issue: 14th Amendment – Equal Protection/Privileges & Immunities (16 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	43.8%	56.3%
Ginsburg	50.0%	50.0%
Kennedy	25.0%	75.0%
O'Connor	37.5%	62.5%

Rehnquist *	40.0%	60.0%
Scalia	43.8%	56.3%
Souter	50.0%	50.0%
Stevens	43.8%	56.3%
Thomas **	53.5%	46.7%

* Chief Justice Rehnquist did not participate in *Johnson v. California - No. 03-363.*

** Justice Thomas did not participate in *United States v. Virginia.*

Issue: 15th Amendment - Voting (1 case)

Justice	**% - Deferential**	**% - Non-Deferential**
Breyer	0.0%	100%
Ginsburg	100%	0.0%
Kennedy	0.0%	100%
O'Connor	0.0%	100%
Rehnquist	0.0%	100%
Scalia	0.0%	100%
Souter	0.0%	100%
Stevens	100%	0.0%
Thomas	0.0%	100%

Issue: 1st Amendment – Establishment Clause (10 cases)

Justice	**% - Deferential**	**% - Non-Deferential**
Breyer	30.0%	70.0%
Ginsburg	30.0%	70.0%
Kennedy	60.0%	40.0%
O'Connor	40.0%	60.0%
Rehnquist	80.0%	20.0%
Scalia *	77.8%	22.2%
Souter	20.0%	80.0%
Stevens	30.0%	70.0%
Thomas	70.0%	30.0%

* Justice Scalia did not participate in *Elk Grove v. Newdow.*

Issue: 1st Amendment – Free Association (5 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	60.0%	40.0%
Ginsburg	40.0%	60.0%
Kennedy	40.0%	60.0%
O'Connor	40.0%	60.0%
Rehnquist	40.0%	60.0%
Scalia	40.0%	60.0%
Souter	40.0%	60.0%
Stevens	40.0%	60.0%
Thomas	40.0%	60.0%

Issue: 1st Amendment – Free Exercise (3 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	66.7%	33.3%
Ginsburg	33.3%	66.7%
Kennedy	33.3%	66.7%
O'Connor	66.7%	33.3%
Rehnquist	66.7%	33.3%
Scalia	0.0%	100%
Souter	66.7%	33.3%
Stevens	33.3%	66.7%
Thomas	0.0%	100%

Issue: 1st Amendment – Free Speech (20 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	60.0%	40.0%
Ginsburg	35.0%	65.0%
Kennedy	20.0%	80.0%
O'Connor	65.0%	35.0%
Rehnquist	65.0%	35.0%

Scalia	55.0%	45.0%
Souter	20.0%	80.0%
Stevens	25.0%	75.0%
Thomas	35.0%	65.0%

Issue: 4th Amendment – Search & Seizure (12 cases)

Justice	**% - Deferential**	**% - Non-Deferential**
Breyer	58.3%	41.7%
Ginsburg	33.3%	66.7%
Kennedy	91.7%	8.3%
O'Connor	66.7%	33.3%
Rehnquist	100%	0.0%
Scalia	91.7%	8.3%
Souter	33.3%	66.7%
Stevens	16.7%	83.3%
Thomas	91.7%	8.3%

Issue: 5th Amendment – Double Jeopardy/Due Process/Self-Incrimination (7 cases)

Justice	**% - Deferential**	**% - Non-Deferential**
Breyer	42.9%	57.1%
Ginsburg	28.6%	71.4%
Kennedy	57.1%	42.9%
O'Connor	85.7%	14.3%
Rehnquist	71.4%	28.6%
Scalia	85.7%	14.3%
Souter	28.6%	71.4%
Stevens	0.0%	100%
Thomas	71.4%	28.6%

Issue: 5th Amendment – Takings Clause (2 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	100%	0.0%
Ginsburg	100%	0.0%
Kennedy	100%	0.0%
O'Connor	50.0%	50.0%
Rehnquist	0.0%	100%
Scalia	0.0%	100%
Souter	100%	0.0%
Stevens	100%	0.0%
Thomas	0.0%	100%

Issue: 6th Amendment – Jury Trial (3 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	66.7%	33.3%
Ginsburg	0.0%	100%
Kennedy	66.7%	33.3%
O'Connor	100%	0.0%
Rehnquist	100%	0.0%
Scalia	100%	0.0%
Souter	100%	0.0%
Stevens	100%	0.0%
Thomas	100%	0.0%

Issue: 8th Amendment – Cruel & Unusual Punishment (8 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	0.0%	100%
Ginsburg	0.0%	100%
Kennedy	25.0%	75.0%
O'Connor	37.5%	62.5%
Rehnquist	75.0%	25.0%

Scalia	87.5%	12.5%
Souter	0.0%	100%
Stevens	0.0%	100%
Thomas	87.5%	12.5%

Issue: Habeas Corpus (41 cases)

Justice	**% - Deferential**	**% - Non-Deferential**
Breyer	22.0%	78.0%
Ginsburg	19.5%	80.5%
Kennedy	56.1%	43.9%
O'Connor	58.5%	41.5%
Rehnquist *	77.5%	22.5%
Scalia	87.8%	12.2%
Souter	17.1%	82.9%
Stevens	19.5%	80.5%
Thomas	90.2%	9.8%

* Chief Justice Rehnquist did not participate in *Brown v. Payton*.

Issue: Standing / Jurisdiction / Writ (6 cases)

Justice	**% - Deferential**	**% - Non-Deferential**
Breyer	33.3%	66.7%
Ginsburg	83.3%	16.7%
Kennedy	50.0%	50.0%
O'Connor	33.3%	66.7%
Rehnquist	83.3%	16.7%
Scalia	83.3%	16.7%
Souter	66.7%	33.3%
Stevens	50.0%	50.0%
Thomas	66.7%	33.3%

Issue: Federalism (18 cases)

Justice	% - Deferential	% - Non-Deferential
Breyer	63.0%	37.0%
Ginsburg	74.0%	26.0%
Kennedy	26.0%	74.0%
O'Connor	42.0%	58.0%
Rehnquist	53.0%	47.0%
Scalia	37.0%	63.0%
Souter	63.0%	37.0%
Stevens	63.0%	37.0%
Thomas	37.0%	63.0%

IV. DEFERENCE TABLES FOR INDIVIDUAL JUSTICES

Justice Breyer

Issue Description	% - Deferential	% - Non-Deferential
11th Amendment	50.0%	50.0%
14th Amendment - Due Process	21.4%	78.6%
14th Amendment - Equal Protection/Privileges & Immunities.	43.8%	56.3%
15th Amendment - Voting	0.0%	100%
1st Amendment - Establishment Clause	30.0%	70.0%
1st Amendment - Free Association	60.0%	40.0%
1st Amendment - Free Exercise	66.7%	33.3%
1st Amendment - Free Speech	60.0%	40.0%
4th Amendment - Search & Seizure	58.3%	41.7%
5th Amendment - Double Jeopardy/Due Process/Self-Incrimination	42.9%	57.1%
5th Amendment - Takings Clause	100%	0.0%
6th Amendment - Jury Trial	66.7%	33.3%

8th Amendment - Cruel & Unusual Punishment	0.0%	100%
Habeas Corpus	22.0%	78.0%
Standing / Jurisdiction / Writ	33.3%	66.7%
Federalism Cases	63.0%	37.0%

Justice Ginsburg

Issue Description	**% - Deferential**	**% - Non-Deferential**
11th Amendment	25.0%	75.0%
14th Amendment - Due Process	42.9%	57.1%
14th Amendment - Equal Protection/Privileges & Immunities.	50.0%	50.0%
15th Amendment - Voting	100%	0.0%
1st Amendment - Establishment Clause	30.0%	70.0%
1st Amendment - Free Association	40.0%	60.0%
1st Amendment - Free Exercise	33.3%	66.7%
1st Amendment - Free Speech	35.0%	65.0%
4th Amendment - Search & Seizure	33.3%	66.7%
5th Amendment - Double Jeopardy/Due Process/Self-Incrimination	28.6%	71.4%
5th Amendment - Takings Clause	100%	0.0%
6th Amendment - Jury Trial	0.0%	100%
8th Amendment - Cruel & Unusual Punishment	0.0%	100%
Habeas Corpus	19.5%	80.5%
Standing / Jurisdiction / Writ	83.8%	16.7%
Federalism Cases	74.0%	26.0%

Justice Kennedy

Issue Description	% - Deferential	% - Non-Deferential
11th Amendment	75.0%	25.0%
14th Amendment - Due Process	57.1%	42.9%
14th Amendment - Equal Protection/Privileges & Immunities.	25.0%	75.0%
15th Amendment - Voting	0.0%	100%
1st Amendment - Establishment Clause	60.0%	40.0%
1st Amendment - Free Association	40.0%	60.0%
1st Amendment - Free Exercise	33.3%	66.7%
1st Amendment - Free Speech	20.0%	80.0%
4th Amendment - Search & Seizure	91.7%	8.3%
5th Amendment - Double Jeopardy/Due Process/Self-Incrimination	57.1%	42.9%
5th Amendment - Takings Clause	100%	0.0%
6th Amendment - Jury Trial	66.7%	33.3%
8th Amendment - Cruel & Unusual Punishment	25.0%	75.0%
Habeas Corpus	56.1%	43.9%
Standing / Jurisdiction / Writ	50.0%	50.0%
Federalism Cases	26.0%	74.0%

Justice O'Connor

Issue Description	% - Deferential	% - Non-Deferential
11th Amendment	75.0%	25.0%
14th Amendment - Due Process	42.9%	57.1%
14th Amendment - Equal Protection/Privileges & Immunities.	37.5%	62.5%
15th Amendment - Voting	0.0%	100%
1st Amendment - Establishment Clause	46.0%	60.0%
1st Amendment - Free Association	40.0%	60.0%
1st Amendment - Free Exercise	66.7%	33.3%

1st Amendment - Free Speech	65.0%	35.0%
4th Amendment - Search & Seizure	66.7%	33.3%
5th Amendment - Double Jeopardy/Due Process/Self-Incrimination	85.7%	14.3%
5th Amendment - Takings Clause	50.0%	50.0%
6th Amendment - Jury Trial	100%	0.0%
8th Amendment - Cruel & Unusual Punishment	37.5%	62.5%
Habeas Corpus	58.5%	41.5%
Standing / Jurisdiction / Writ	33.3%	66.7%
Federalism Cases	42.0%	58.0%

Chief Justice Rehnquist

Issue Description	**% - Deferential**	**% - Non-Deferential**
11th Amendment	75.0%	25.0%
14th Amendment - Due Process	78.6%	21.4%
14th Amendment - Equal Protection/Privileges & Immunities	40.0%	60.0%
15th Amendment - Voting	0.0%	100%
1st Amendment - Establishment Clause	80.0%	20.0%
1st Amendment - Free Association	40.0%	60.0%
1st Amendment - Free Exercise	66.7%	33.3%
1st Amendment - Free Speech	65.0%	35.0%
4th Amendment - Search & Seizure	100%	0.0%
5th Amendment - Double Jeopardy/Due Process/Self-Incrimination	71.4%	28.6%
5th Amendment - Takings Clause	0.0%	100%
6th Amendment - Jury Trial	100%	0.0%
8th Amendment - Cruel & Unusual Punishment	75.0%	25.0%
Habeas Corpus	77.5%	22.5%
Standing / Jurisdiction / Writ	83.3%	16.7%
Federalism Cases	53.0%	47.0%

Justice Scalia

Issue Description	% - Deferential	% - Non-Deferential
11th Amendment	75.0%	25.0%
14th Amendment - Due Process	100%	0.0%
14th Amendment - Equal Protection/Privileges & Immunities.	43.8%	56.3%
15th Amendment - Voting	0.0%	100%
1st Amendment - Establishment Clause	77.8%	22.2%
1st Amendment - Free Association	40.0%	60.0%
1st Amendment - Free Exercise	0.0%	100%
1st Amendment - Free Speech	55.0%	45.0%
4th Amendment - Search & Seizure	91.7%	8.3%
5th Amendment - Double Jeopardy/Due Process/Self-Incrimination	85.7%	14.3%
5th Amendment - Takings Clause	0.0%	100%
6th Amendment - Jury Trial	100%	0.0%
8th Amendment - Cruel & Unusual Punishment	87.5%	12.5%
Habeas Corpus	87.8%	12.2%
Standing / Jurisdiction / Writ	83.3%	16.7%
Federalism Cases	37.0%	63.0%

Justice Souter

Issue Description	% - Deferential	% - Non-Deferential
11th Amendment	50.0%	50.0%
14th Amendment - Due Process	21.4%	78.6%
14th Amendment - Equal Protection/Privileges & Immunities.	50.0%	50.0%
15th Amendment - Voting	0.0%	100%
1st Amendment - Establishment Clause	20.0%	80.0%
1st Amendment - Free Association	40.0%	60.0%
1st Amendment - Free Exercise	66.7%	33.3%

1st Amendment - Free Speech	20.0%	80.0%
4th Amendment - Search & Seizure	33.3%	66.7%
5th Amendment - Double Jeopardy/Due Process/Self-Incrimination	28.6%	71.4%
5th Amendment - Takings Clause	100%	0.0%
6th Amendment - Jury Trial	100%	0.0%
8th Amendment - Cruel & Unusual Punishment	0.0%	100%
Habeas Corpus	17.1%	82.9%
Standing / Jurisdiction / Writ	66.7%	33.3%
Federalism Cases	63.0%	37.0%

Justice Stevens

Issue Description	**% - Deferential**	**% - Non-Deferential**
11th Amendment	25.0%	75.0%
14th Amendment - Due Process	21.4%	78.6%
14th Amendment - Equal Protection/Privileges & Immunities.	43.8%	56.3%
15th Amendment - Voting	100%	0.0%
1st Amendment - Establishment Clause	30.0%	70.0%
1st Amendment - Free Association	40.0%	60.0%
1st Amendment - Free Exercise	33.3%	66.7%
1st Amendment - Free Speech	25.0%	75.0%
4th Amendment - Search & Seizure	16.7%	83.3%
5th Amendment - Double Jeopardy/Due Process/Self-Incrimination	0.0%	100%
5th Amendment - Takings Clause	100%	0.0%
6th Amendment - Jury Trial	100%	0.0%
8th Amendment - Cruel & Unusual Punishment	0.0%	100%
Habeas Corpus	19.5%	80.5%
Standing / Jurisdiction / Writ	50.0%	50.0%
Federalism Cases	63.0%	37.0%

Justice Thomas

Issue Description	% - Deferential	% - Non-Deferential
11th Amendment	50.0%	50.0%
14th Amendment - Due Process	92.9%	7.1%
14th Amendment - Equal Protection/Privileges & Immunities.	53.3%	46.7%
15th Amendment - Voting	0.0%	100%
1st Amendment - Establishment Clause	70.0%	30.0%
1st Amendment - Free Association	40.0%	60.0%
1st Amendment - Free Exercise	0.0%	100%
1st Amendment - Free Speech	35.0%	65.0%
4th Amendment - Search & Seizure	91.7%	8.3%
5th Amendment - Double Jeopardy/Due Process/Self-Incrimination	71.4%	28.6%
5th Amendment - Takings Clause	0.0%	100%
6th Amendment - Jury Trial	100%	0.0%
8th Amendment - Cruel & Unusual Punishment	87.5%	12.5%
Habeas Corpus	90.2%	9.8%
Standing / Jurisdiction / Writ	66.7%	33.3%
Federalism Cases	37.0%	63.0%

V. PREDICTING JUDICIAL BEHAVIOR

Although an individual who challenges a state's ban on private consensual homosexual activity[44] is instigating a rights model case just as an individual who challenges a state's display of a model of the Ten Commandments,[45] the language of the opinions addressing these and similar concerns can reveal greater or lesser affinity for the individual rights asserted in the respective suits. Put differently, one limitation of treating the rights model

[44] *E.g.*, *Lawrence*, 539 U.S. at 558 (litigating a dispute between a private individual and the state's ban on homosexual activity).

[45] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005) (challenging Texas' Ten Commandments display); McCreary County v. Am. Civil Liberties Union, 545 U.S. 844 (2005) (litigating a challenge to Kentucky's Ten Commandments display).

cases as a single entity is that individual Justices do not necessarily regard all individual rights as of equal importance. As a result, subcategories were created in the rights model cases to predict judicial behavior.

Table M provides the results of this analysis. The rights model cases were subdivided into five categories. Category A includes Fourteenth and Fifteenth Amendment cases, First Amendment freedom of speech and association cases, and First Amendment establishment cases. Category B includes First Amendment free exercise cases. Category C includes Fourth, Fifth, Sixth, and Eighth Amendment cases, as well as habeas corpus cases. Category D includes federalism cases. Category E includes standing, jurisdiction, and related justiciability cases.

Based upon the weighted probabilities of each Justices' votes, Table M presents the number of cases assigned to each category and the number of cases correctly predicted. Obviously, the probability matrix was developed after the Rehnquist Court ended, and it employs a limited number of cases. Nevertheless, the model demonstrates a high degree of reliability in predicting the outcome of cases in the aggregate. In every category except B, where the number of cases was far too low to measure any meaningful predictive pattern, the model predicts actual outcomes in more than eighty-five percent of cases in the aggregate.[46]

[46] It is less likely that such a high level of "correct" predictions would take place at the individual case level. Though initial indications show a solid correlation, the high degree of variance would preclude the possibility of such a strong showing. That said, the model does predict significantly above 50% of the cases in nearly every category (every category where the numbers are sufficient to provide a sufficient number of instances).

Table M:
Prediction of Outcomes based upon Individual Justice Probability

Category	*Number of cases*	*Prediction of deference*	*Number Predicted/Actual*	*Percent Correctly determined by Model*
Category A	71	45%	32/38	92%**
Category B	3	33%	1/2	50%
Category C	73	52%	38/41	95%**
Category D	19	50%	10/8	89%*
Category E	8	61%	5/6	87%*
Total	169	49%	83/97	91%**

** Correlation is significant at the .01/.05 level (two tailed test).

* Correlation is significant at the .10 level (two tailed test).

In addition to generating a model that can predict outcomes, the data collected permits a measurement of individual deference scores for Justices in each of the constructed categories, and thereby allows for a measurement of each Justice's deviation from the mean. Table N reports the results of this analysis. Each Justices' individual voting is measured, by category, against a hypothetical "perfect" mean. The mean is constructed by being insensitive to the precise issue before the Court. Thus, for example, the mean score in Category A is exactly thirty-five because there are seventy cases. The actual voting pattern of each Justice is then measured for the significance of its departure from that mean. This departure should be highest, and most significant, at the theoretical poles. The significance, and the departure from the mean, should disappear for judges whose behavior is centrist—assuming that the cases arriving at the

Court are, themselves, not biased in one direction or another.[47] In each category, the departure from the perfect mean increases as a Justice's voting behavior shows a predilection toward non-deference.

Table N:
Prediction of Outcomes based upon Individual Justice Probability

Justice	Category A 70	Category B 3	Category C 73	Category D 19	Category E 6
Souter	-9**	+.5	-15**	+2.3^{n}	+1
Stevens	-7**	—	-18**	+2.3^{n}	—
Kennedy	-3*	—	+7*	-4.3*	—
Ginsberg	-2	—	-17**	+4.3*	+2^{n}
Breyer	—	+.5	-10**	+2.3^{n}	-1
O'Conner	+4*	+.5	+12**	-.4*	-1
Thomas	+10**	-.5	+30**	-2.3^{n}	+1
Rehnquist	+14**	+.5	+25**	-.5	+2^{n}
Scalia	+15**	-.5	+30**	-2.3^{n}	+2^{n}

** Correlation is significant at the .01 level (two tailed test).

* Correlation is significant at the .05 (two tailed test).

"n" Correlation is significant at the .05 level (one tailed test, or .10 for a two tailed test).

— No predictive power was found in either direction.

CONCLUSION

Legitimacy and deference are not complementary ideals. A Court that is more deferential is not necessarily a Court with greater legitimacy. The issue is more nuanced. A legitimate Court is a Court that is deferential in circumstances where deference is appropriate, and non-deferential in circumstances where deference is inappropriate.

[47] This assumption is important. If, for example, a large bias one way or the other exists amongst the lower courts (for example, lower courts are disproportionately likely to be deferential) then the correction at the high Court could be exaggerated.

What do the data from the Rehnquist Court reveal about legitimacy? As shown, the Justices are differentially deferential, depending on the substantive issue presented in the case. Indeed, it is possible to predict with a great degree of accuracy how those Justices are likely to vote simply by knowing the issue involved in the case. To translate these deference results into legitimacy scores, however, requires a theory that describes when, as a general matter, deference is required.

Although there is no single solution to the so-called counter-majoritarian difficulty, there may be several different solutions, where the answer to how the Justices ought to behave depends on the nature of the issue before them.

In both the rights model and separation-of-powers model, there is a theoretical justification for judicial review. Thus, in RMA, judicial review serves the same essential function that it serves in all higher-law legal systems: protecting the minority against majoritarian enactments that run afoul of principles with which the majority is not permitted to alter.[48] In the SOP cases, the justification is somewhat more difficult, but not impossible to construct. Although there is not necessarily a majority-minority dynamic in these cases, judicial intervention is predicated on the fiction that the system of checks-and-balances is so precisely attuned, that permitting it to become even the slightest bit out of true will lead to tyranny. The theory is a version of the ancient Chinese proverb that a journey of a thousand miles begins with the first step. For example, a slight, nearly imperceptible shift of power from the legislative to the executive branch will not itself cause tyranny, but it will lead to a second shift, which will in turn lead to a third, and so on and so on, such that eventually, there will (or may) be tyranny. This basic argument began with Justice Jackson's concurring opinion in *Youngstown*[49]—a formative SOP case—and continued through Justice Stevens' opinion

[48] Dow, *supra* note 29, at 14-29 (discussing the principle of majoritarianism); David R. Dow & Jose I. Maldonado, Jr., *How Many Spouses Does the Constitution Allow One to Have?*, 20 CONST. COMMENT. 571, 585 n.55 (2003-2004) (reviewing SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA (UNC Press 2002) and stating that majoritarian politics cannot change religious law).

[49] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

in *Clinton v. New York*,[50] perhaps the most recent prominent SOP dispute.

The notion that even the slightest change of the delicate balance of powers will lead to further shifts, which in turn will lead to the threat of tyranny, has a bit of a chicken-little feel to it, and may be entirely wrong as a predictive or theoretical matter.[51] Yet, insofar as the claim is sound, the harm associated with disturbing the SOP scheme (*i.e.*, tyranny) is similar to, and perhaps even identical to, the harm associated with violations of individual rights that are the hallmark of the rights model. In both the rights model and separation of powers cases, therefore, judicial review serves one principal goal: safeguarding liberty from the threat of tyranny. Where the political branches intrude directly on individual rights, or where they seek to alter the balance of power among the federal branches in such a way as to make such an intrusion more probable, the role of the courts is to intervene, to say no to the majority, and thereby to preserve our rights and freedoms.

No such argument is available in the federalism cases. On the contrary, Justice Blackmun suggested more than twenty years ago that there was yet no justification for judicial review in federalism cases, and his assertion has yet to be answered.[52] The closest attempt at providing a theoretical basis for non-deference in these cases occurred in Justice O'Connor's opinion in *New York v. United States*.[53] Justice O'Connor argued that, just as the horizontal allocation of power among the three federal branches prevents any branch from accumulating so much power as to

[50] 524 U.S. 417, 430-31 (1998) (recognizing the "importance of respecting the constitutional limits on [the court's] jurisdiction, even when Congress has manifested an interest in obtaining [the court's] views as promptly as possible," the court nevertheless determined that the challenge to the Constitutionality of the particular Act involved was justiciable since the President had exercised his authority, and appellees alleged an injury as a result of that action).

[51] *See id.* at 478 (Breyer, J., dissenting) (explaining that the Act in question did not grant the executive too much power; Congress merely created a law that delegated power to nullify statutory language).

[52] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 560 (1985) (Powel, J., dissenting) (stating that due to the Court's decision, the role of States in the federal system now depends upon federal officials, rather than on the Constitution as interpreted by the Court).

[53] 505 U.S. 144, 149 (1992) (concluding that "while Congress has substantial power under the Constitution to encourage States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so.").

pose a threat to liberty, the vertical distribution of power between the federal government, on the one hand, and the state governments, on the other, serves the identical function.[54] But Justice O'Connor's claim has always been vulnerable to three observations. First, if the underlying idea in the SOP cases is that perfect horizontal equilibrium among the three federal branches is the key to avoiding tyranny, then the vertical distribution of power should be irrelevant, except in those cases where it tips the horizontal balance. However, it is hard to see how a shift of power from the states to the federal government, or vice versa, could ever alter the horizontal federal balance, except for those cases where Congress is ceding some of its own power to the states. Nonetheless, this is certainly not what occurs in the SOP cases that raised the interest of the Rehnquist Court. Second, Justice Blackmun observed in *Garcia v. San Antonio Metropolitan Transit Authority* that the states are fully capable of protecting their sovereign interests simply by virtue of the fact that members of Congress are also citizens of their respective states,[55] and no one has yet provided a satisfactory answer to that observation. Finally, although Justice O'Connor is surely correct when she says that voters must know whom to blame when the government enacts an unpopular measure,[56] it is hard to see how this truth justifies non-deference in the federalism cases. This is an era when most voters do not know whom to blame because they do not know who their representatives are.[57] Resting any

[54] *See id.* at 181-82 (noting the separation of powers among federal branches of governments and the distribution of power between federal and state governments serve the same function).

[55] *See Garcia*, 469 U.S. at 550-51 (describing the Framer's Constitutional design to protect the states from overreaching by Congress).

[56] *See New York v. United States*, 505 U.S. at 168–69 (explaining that when the Federal Government compels the state to act, the accountability of both state and federal officials is diminished; state officials may suffer public, and voter disapproval despite federal officials having designed the regulatory program); *see also* United States v. Lopez, 514 U.S. 549, 576–78 (1995) ("The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.").

[57] *See* Stephen Ansolabehere & Phil Jones, *Constituents' Policy Perceptions and Approval of their Members of Congress* (2005), http://web.mit.edu/polisci/portl/material/papers/ansolabehere_jones.pdf. Data is listed from 2005 that reveals only about one-half of all Americans can name their representative in the U.S. Congress. *Id.* at 16-18. Of those who can name their representative, many do not know how their representative voted on many salient issues. *Id. See also* Press Release, Most Americans Can't Name

constitutional argument on the people's familiarity with their elected officials is precarious.

What is left, therefore, is this: Justice Stevens and Justice Scalia were the poles of the Rehnquist Court, and may yet prove to be the poles of the Roberts Court. The difference between them is not that one is more deferential than the other, or more activist, or more distant from the mean. The difference is that Justice Stevens is non-deferential in cases where non-deference is theoretically sound, while Justice Scalia votes to thwart the majority in cases where the majoritarian view ought to rule.

Any Supreme Court Justices, Says FindLaw.com Survey (Jan. 10, 2006), http://company.findlaw.com/pr/2006/011006.supremes.html. The national survey results are listed. *Id.*; *New York v. United States*, 505 U.S. at 181. The fundamental purpose of protecting individuals is served by the structure of the government. *Id. New York v. United States* is one of the very few contemporary federalism cases where the interests of the federal and state governments have not in fact been aligned. *Id.* For that reason, and that reason alone, the finding that New York's grievance presented a justiciable issue is sound, even if the more general language relating to federalism cases as a whole is not.

APPENDIX 1: ALPHABETICAL CASE LIST, WITH VOTES BY JUSTICE

Case Name	Issue / Model	Deferential Justice(s)	Non-Deferential Justice(s)
44 Liquormart Inc. v. Rhode Island	1st Amendment - Free Speech (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
Agostini v. Felton	1st Amendment - Establishment Clause (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Alden v. Maine	11th Amendment (F)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
Arkansas Educ. Television Comm'n v. Forbes	1st Amendment - Free Speech (R)	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Ginsburg, Souter, Stevens
Ashcroft v. ACLU (Decided May 13, 2002)	1st Amendment - Free Speech (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas	Stevens
Ashcroft v. ACLU (Decided June 29, 2004)	1st Amendment - Free Speech (R)	Breyer, O'Connor, Rehnquist, Scalia	Ginsburg, Kennedy, Souter, Stevens, Thomas

Ashcroft v. Free Speech Coalition	1st Amendment - Free Speech (R)	O'Connor, Rehnquist, Scalia	Breyer, Ginsburg, Kennedy, Souter, Stevens, Thomas
Atkins v. Virginia	8th Amendment - Cruel & Unusual Punishment (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Atwater v. City of Lago Vista	4th Amendment - Search & Seizure (R)	Kennedy, Rehnquist, Scalia, Souter, Thomas	Breyer, Ginsburg, O'Connor, Stevens
Banks v. Dretke	Habeas Corpus (R)	Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens
Beard v. Banks †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Bell v. Cone †	Habeas Corpus (R)	Breyer, Ginsburg, Kennedy,O'Connor, Rehnquist, Scalia, Souter, Thomas	Stevens
Bennis v. Michigan	14th Amendment - Due Process (R)	Ginsburg, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Kennedy, Souter, Stevens

Blakely v. Washington	6th Amendment - Jury Trial (R)	Breyer, Kennedy, O'Connor, Rehnquist	Ginsburg, Scalia, Souter, Stevens, Thomas
BMW of North America, Inc. v. Gore	14th Amendment - Due Process (R)	Ginsburg, Rehnquist, Scalia, Thomas	Breyer, Kennedy, O'Connor, Souter, Stevens
Board of Education v. Earls	4th Amendment - Search & Seizure (R)	Breyer, Kennedy, Rehnquist, Scalia, Thomas	Ginsburg, O'Connor, Souter, Stevens
Board of Regents v. Southworth	1st Amendment - Free Association (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
Board of Trustees v. Garrett	11th Amendment / 14th - Equal Protection (F)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
Bogan v. Scott-Harris †	11th Amendment (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a
Boy Scouts of America v. Dale	1st Amendment - Free Association (R)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas

Bracy v. Gramley †	Habeas Corpus (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
Bradshaw v. Stumpf †	Habeas Corpus (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
Brosseau v. Hagen †	4th Amendment - Search & Seizure (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas	Stevens
Brown v. Payton † *	Habeas Corpus (R)	Breyer, Kennedy, O'Connor, Scalia, Thomas	Ginsburg, Souter, Stevens
Buckley v. ACLF	1st Amendment - Free Speech (R)	Breyer, O'Connor, Rehnquist	Ginsburg, Kennedy, Scalia, Souter, Stevens, Thomas
Bunting v. Mellen †	1st Amendment - Establishment Clause (R)	Rehnquist, Scalia	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens, Thomas

Bush v. Gore	14th Amendment - Equal Protection (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Bush v. Vera	14th Amendment - Equal Protection (R)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
Calderon v. Thompson †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Camps Newfound v. Town of Harrison	I/8 - Commerce Clause – Dormant (F)	Ginsburg, Rehnquist, Scalia, Thomas	Breyer, Kennedy, O'Connor, Souter, Stevens
Capitol Square Rev. & Advisory Bd. v. Pinette	1st Amendment - Establishment Clause (R)	Ginsburg, Stevens	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas
Carlisle v. United States †	5th Amendment - Due Process (R)	Breyer, Ginsburg, O'Connor, Rehnquist, Scalia, Souter, Thomas	Kennedy, Stevens
City of Boerne v. Flores	1st Amendment - Free Exercise (R)	Breyer, O'Connor, Souter	Ginsburg, Kennedy, Rehnquist, Scalia, Stevens, Thomas

City of Chicago v. Morales †	14th Amendment - Due Process (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Clay v. United States †	Habeas Corpus (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
Clingman v. Beaver †	1st Amendment - Free Association (R)	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Ginsburg, Stevens, Souter
Clinton v. City of New York	I/7 - Presentment Clause (F)	Breyer, O'Connor, Scalia	Ginsburg, Kennedy, Rehnquist, Souter, Stevens, Thomas
Colo. Repub. Fed. Campaign Comm'n v. FEC †	1st Amendment - Free Speech (R)	Ginsburg, Stevens	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas
Cook v. Gralike †	I/4 - Elections Clause (F)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas

County of Sacramento v. Lewis	4th Amendment - Search & Seizure (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a
Denmore v. Hyung Joon Kim	5th Amendment - Due Process (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Denver Area Educ. Telecom. Con, Inc. v. FCC	1st Amendment - Free Speech (R)	O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, Souter, Stevens
Dept. of Commerce v. U.S. House of Rep.	III/2 – Standing / Statutory - Census Act (F)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist Scalia, Thomas
Dodd v. United States †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Dretke v. Haley †	Habeas Corpus (R)	Breyer, Ginsburg, O'Connor, Rehnquist, Scalia, Thomas	Kennedy, Souter, Stevens
Duncan v. Walker †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	Breyer, Ginsburg

Early v. Packer †	Habeas Corpus (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a
Edwards v. Carpenter †	Habeas Corpus (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a
Elk Grove v. Newdow **	1st Amendment - Establishment Clause (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens, Thomas	n/a
Ewing v. California	8th Amendment - Cruel & Unusual Punishment (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
F.E.C. v. Colorado Republican	1st Amendment - Free Association (R)	Breyer, Ginsburg, O'Connor, Souter, Stevens	Kennedy, Rehnquist, Scalia, Thomas
Federal Republic of Germany v. United States †	Jurisdiction - Bill of Complaint (in a criminal case) (R)	Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas	Breyer, Stevens

Felker v. Turpin	Habeas Corpus (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a
Ferguson v. City of Charleston	4th Amendment - Search & Seizure (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Florida Bar v. Went-For-It, Inc.	1st Amendment - Free Speech (R)	Breyer, O'Connor, Rehnquist, Scalia, Thomas	Ginsburg, Kennedy, Souter, Stevens
Georgia v. Ashcroft	14th Amendment - Equal Protection (R)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
Gonzales v. Crosby †	Habeas Corpus (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Souter, Stevens
Good News Club v. Milford Central School	1st Amendment - Establishment Clause (R)	Ginsburg, Souter, Stevens	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Thomas
Granholm v. Heald †	I/8 - Commerce Clause (F)	O'Connor, Rehnquist, Stevens, Thomas	Breyer, Ginsburg, Kennedy, Scalia, Souter

Gratz v. Bollinger	14th Amendment - Equal Protection (R)	Ginsburg, Souter	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Stevens, Thomas
Gray v. Netherland †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Grutter v. Bollinger	14th Amendment - Equal Protection (R)	Breyer, Ginsburg, O'Connor, Souter, Stevens	Kennedy, Rehnquist, Scalia, Thomas
Hamdi v. Rumsfeld	Habeas Corpus (R)	Scalia, Stevens, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter
Harris v. United States	5th Amendment - Due Process (R)	Breyer, Kennedy, O'Connor, Rehnquist, Scalia	Ginsburg, Souter, Stevens, Thomas
Hiibel v. Sixth Judicial District Court	4th Amendment - Search & Seizure (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Hohn v. United States †	Habeas Corpus (R)	O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, Souter, Stevens
Hope v. Pelzer †	8th Amendment - Cruel & Unusual Punishment (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter,Stevens

Hurley v. Irish-American Gay Gp. of Boston	1st Amendment - Free Speech (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
I.N.S. v. St. Cyr	Habeas Corpus (R)	O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, Souter, Stevens
Idaho v. Coeur d'Alene Tribe †	11th Amendment (F)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Illinois v. Wardlow	4th Amendment - Search & Seizure (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Johnson v. California - No. 03-363 *	14th Amendment - Equal Protection (R)	Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Johnson v. California - No. 04-6964 †	14th Amendment - Equal Protection (R)	Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens
Jones v. United States	6th Amendment - Jury Trial (R)	Breyer, Kennedy, O'Connor, Rehnquist	Ginsburg, Scalia, Souter, Stevens, Thomas

Kansas v. Hendricks	14th Amendment - Due Process (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Kelo v. City of New London	5th Amendment - Takings Clause (R)	Breyer, Ginsburg, Kennedy, Souter, Stevens	O'Connor, Rehnquist, Scalia, Thomas
Khanh Phong Nguyen v. United States †	Jurisdiction - Art. IV Judges (Criminal Case) (R)	Breyer, Ginsburg, Rehnquist, Scalia	Kennedy, O'Connor, Souter, Stevens, Thomas
Kimel v. Florida Bd. Of Regents	11th Amendment (F)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
Kiowa Tribe of Oklahoma v. Mfg. Tech. Inc. †	11th Amendment (R)	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Souter	Ginsburg, Stevens, Thomas
Kyllo v. United States	4th Amendment - Search & Seizure (R)	Kennedy, O'Connor, Rehnquist, Stevens	Breyer, Ginsburg, Scalia, Souter, Thomas
Lawrence v. Texas	14th Amendment - Due Process (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Lindh v. Murphy	Habeas Corpus (R)	Kennedy, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, O'Connor, Souter, Stevens

Locke v. Davey	1st Amendment - Free Exercise (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens	Scalia, Thomas
Lockyer v. Andrade	8th Amendment - Cruel & Unusual Punishment (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Lorillard Tobacco v. Reilly	1st Amendment - Free Speech (R)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
McCreary v. ACLU	1st Amendment - Establishment Clause (R)	Kennedy, Rehnquist, Scalia, Thomas	Breyer, Ginsburg,O'Connor, Souter, Stevens
McIntyre v. Ohio Elections Com'n	1st Amendment - Free Speech (R)	Rehnquist, Scalia,	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens, Thomas
McKune v. Lile	5th Amendment - Self Incrimination (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
McMillan v. Monroe County †	11th Amendment (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Miller v. Johnson	14th Amendment - Equal Protection (R)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas

Miller-El v. Cockrell	Habeas Corpus (R)	Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens
Miller-El v. Dredke	Habeas Corpus (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Missouri v. Jenkins	14th Amendment - Equal Protection (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Mitchell v. Helms	1st Amendment - Establishment Clause (R)	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Ginsburg, Souter, Stevens
Montana v. Egelhoff†	14th Amendment - Due Process (R)	Ginsburg, Kennedy, Rehnquist, Scalia, Thomas	Breyer, O'Connor, Souter, Stevens
Morse v. Repub. Party of Virginia†	1st Amendment - Free Association (R)	Kennedy, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, O'Connor, Souter, Stevens
Nat'l Park Hospitality Ass'n v. Dep't of Interior†	III/2 - Ripeness (R)	Ginsburg, Kennedy, Rehnquist, Scalia, Souter, Stevens, Thomas	Breyer, O'Connor

NEA v. Finley	1st Amendment - Free Speech (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Stevens, Thomas	Souter
Neder v. United States †	5th Amendment - Due Process (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
Nelson v. Campbell †	8th Amendment - Cruel & Unusual Punishment (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
Nevada Dep't of Human Resources v. Hibbs	11th Amendment (F)	Breyer, Ginsburg, O'Connor, Rehnquist, Souter, Stevens	Kennedy, Scalia, Thomas
Nike, Inc. v. Kasky	Writ Improvidently Granted (R)	Ginsburg, Rehnquist, Scalia, Souter, Stevens, Thomas	Breyer, Kennedy, O'Connor
Nixon v. Shrink Mo. Gov't	1st Amendment - Free Speech (R)	Breyer, Ginsburg, O'Connor, Rehnquist, Souter, Stevens	Kennedy, Scalia, Thomas

O'Dell v. Netherland	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Ohio Forestry Ass'n v. Sierra Club †	III/2 - Standing (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a
Oklahoma Tax Com'n v. Jefferson Lines, Inc. †	I/8 - Commerce Clause (F)	Ginsburg, Kennedy, Rehnquist, Scalia, Souter, Stevens, Thomas	Breyer, O'Connor
O'Neal v. McAninch	Habeas Corpus (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
O'Sullivan v. Boerckel †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas	Breyer, Ginsburg, Stevens
Pace v. DiGuglielmo †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Penry v. Johnson	8th Amendment - Cruel & Unusual Punishment (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens

Raines v. Byrd	III/2 - Standing (F)	Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas	Breyer, Stevens
Ramdass v. Angelone †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Rasul v. Bush	Habeas Corpus (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Reno v. American Civil Liberties Union	1st Amendment - Free Speech (R)	O'Connor, Rehnquist	Breyer, Ginsburg, Kennedy, Scalia, Souter, Stevens, Thomas
Republican Party of Minnesota v. White	1st Amendment - Free Speech (R)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
Rice v. Cayetano	15th Amendment - Voting (R)	Ginsburg, Stevens	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas
Ring v. Arizona	6th Amendment - Jury Trial (R)	O'Connor, Rehnquist	Breyer, Ginsburg, Kennedy, Scalia, Souter, Stevens, Thomas

Romer v. Evans	14th Amendment - Equal Protection (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Rompilla v. Beard	Habeas Corpus (R)	Kennedy, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, O'Connor, Souter, Stevens
Roper v. Simmons	8th Amendment - Cruel & Unusual Punishment (R)	O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, Souter, Stevens
Rumsfeld v. Padilla	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Saenz v. Roe	14th Amendment - Privileges & Immunities Clause (R)	Rehnquist, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Scalia, Souter, Stevens
Sandin v. Conner	14th Amendment - Due Process (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Santa Fe I.S.D. v. Doe	1st Amendment - Establishment Clause (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens

Schriro v. Summerlin	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Seminole Tribe of Fla. v. Fla.	11th Amendment (F)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
Shafer v. South Carolina †	14th Amendment - Due Process (R)	Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens
Shaw v. Hunt	14th Amendment - Equal Protection (R)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
Slack v. McDaniel †	Habeas Corpus (R)	Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens
Smith v. Texas †	8th Amendment - Cruel & Unusual Punishment (R)	Scalia, Thomas	Breyer, Ginsburg, Kennedy,O'Connor Rehnquist, Souter, Stevens
State Farm v. Campbell	14th Amendment - Due Process (R)	Ginsburg, Scalia, Thomas	Breyer, Kennedy,O'Connor Rehnquist, Souter, Stevens

Stenberg v. Carhart	14th Amendment - Due Process (R)	Kennedy, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, O'Connor, Souter, Stevens
Strickler v. Greene †	Habeas Corpus (R)	Breyer, Ginsburg, O'Connor, Rehnquist, Scalia, Stevens, Thomas	Kennedy, Souter
Swidler & Berlin v. United States	5th Amendment - Self-Incrimination (R)	O'Connor, Scalia, Thomas	Breyer, Ginsburg, Kennedy, Rehnquist, Souter, Stevens
Swint v. Chambers County Com'n †	Jurisdiction - Pendent Party / 11th Amendment (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
Tahoe-Sierra Preserv. v. Tahoe Regional	5th Amendment - Takings Clause (R)	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens	Rehnquist, Scalia, Thomas
Tenet v. Poe †	14th Amendment - Due Process (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a

Tennessee Student Assistance Corp. v. Hood †	11th Amendment (F)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens	Scalia, Thomas
Tennard v. Dretke †	Habeas Corpus (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Tennessee v. Lane	14th Amendment - Equal Protection (R)	Breyer, Ginsburg, O'Connor, Souter, Stevens	Kennedy, Rehnquist, Scalia, Thomas
Town of Castle Rock v. Gonzales †	14th Amendment - Due Process (R)	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas	Ginsburg, Stevens
Troxel v. Granville	14th Amendment - Due Process (R)	Kennedy, Scalia, Stevens	Breyer, Ginsburg, O'Connor, Rehnquist, Souter, Thomas
Tyler v. Cain †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
U.S. Term Limits, Inc. v. Thornton	10th Amendment - Term Limits (F)	O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, Souter, Stevens

United States v. American Library Ass'n	1st Amendment - Free Speech (R)	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Ginsburg, Souter, Stevens
United States v. Drayton	4th Amendment - Search & Seizure (R)	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Ginsburg, Souter, Stevens
United States v. Lopez	I/8 - Commerce Clause (F)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
United States v. Morrison	I/8 - Commerce Clause (F)	Breyer, Ginsburg, Souter, Stevens	Kennedy, O'Connor, Rehnquist, Scalia, Thomas
United States v. Playboy Entertainment	1st Amendment - Free Speech (R)	Breyer, O'Connor, Rehnquist, Scalia	Ginsburg, Kennedy, Souter, Stevens, Thomas
United States v. United Foods, Inc.	1st Amendment - Free Speech (R)	Breyer, Ginsburg, O'Connor	Kennedy, Rehnquist, Scalia, Souter, Stevens, Thomas
United States v. Ursery	5th Amendment - Double Jeopardy (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas	Stevens

United States v. Virginia ***	14th Amendment - Equal Protection (R)	Scalia	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens
Utah v. Evans †	I/2 - Enumeration Clause (F)	Breyer, Ginsburg, Rehnquist, Souter, Stevens	Kennedy, O'Connor, Scalia, Thomas
Vacco v. Quill	14th Amendment - Equal Protection (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a
Van Orden v. Perry	1st Amendment - Establishment Clause (R)	Breyer, Kennedy, Rehnquist, Scalia, Thomas	Ginsburg, O'Connor, Souter, Stevens
Vieth v. Jubelirer	14th Amendment - Equal Protection (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens
Vermont Agency of Nat'l Res. v. United States	III/2 - Standing (F)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Souter, Stevens
Vernonia School Dist. v. Acton	4th Amendment - Search & Seizure (R)	Breyer, Ginsburg, Kennedy, Rehnquist, Scalia, Thomas	O'Connor, Souter, Stevens

Virginia v. Black	1st Amendment - Free Speech (R)	Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens
Washington v. Glucksberg	14th Amendment - Due Process (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a
Watchtower Bible v. Village of Stratton	1st Amendment - Free Exercise (R)	Rehnquist	Breyer, Ginsburg, Kennedy, O'Connor, Scalia, Souter, Stevens, Thomas
Wiggins v. Smith	Habeas Corpus (R)	Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens
Williams v. Taylor	Habeas Corpus (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas

Williams v. Taylor	Habeas Corpus (R)	Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens
Wilson v. Layne	4th Amendment - Search & Seizure (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Thomas	Stevens
Wisconsin Dept. of Corrections v. Schacht †	11th Amendment (R)	n/a	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas
Woodford v. Garceau †	Habeas Corpus (R)	Kennedy, O'Connor, Rehnquist, Scalia, Stevens, Thomas	Breyer, Ginsburg, Souter
Woodford v. Visciotti †	Habeas Corpus (R)	Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Scalia, Souter, Stevens, Thomas	n/a
Wyoming v. Houghton	4th Amendment - Search & Seizure (R)	Breyer, Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Ginsburg, Souter, Stevens

Zadvydas v. Davis	Habeas Corpus (R)	Kennedy, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, O'Connor, Souter, Stevens
Zelman v. Simmons-Harris	1st Amendment - Establishment Clause (R)	Kennedy, O'Connor, Rehnquist, Scalia, Thomas	Breyer, Ginsburg, Souter, Stevens

† Case is not included in the Linda Greenhouse New York Times article(s)

* Chief Justice Rehnquist did not participate in *Brown v. Payton* or *Johnson v. California - No. 03-363.*

** Justice Scalia did not participate in *Elk Grove v. Newdow.*

*** Justice Thomas did not participate in *United States v. Virginia.*

APPENDIX 2: GREENHOUSE DATA-SET VIS-À-VIS CASES EVALUATED FOR THIS ANALYSIS

Cases in the Linda Greenhouse Article(s) not included in the Deference Article (Categories of cases indicated are as listed in the Greenhouse article(s))

Abrams v. Johnson (1997) – Civil Rights
Adarand Constructors v. Pena (1995) – Discrimination A Stricter Standard For Affirmative Action
Aetna Health Inc. v. Davila (2004) – Federalism & Regulation
Alabama v. Shelton (2002) – Executions, Sex Offenders, Buses
Alaska Department of Environmental Conservation v. Environ mental Protection Agency (2004) – Federalism & Regulation
Albertsons Inc. v. Kirkingburg – In Disability Cases, A Narrower Definition
Alexander v. Sandoval (2001) – Civil Rights
Amchem Products v. Windsor (1997) – Liability
American Airlines v. Wolens (1995) – Business, Taxes Frequent Flier Contract Gets Cleared for Takeoff
American Insurance Association v. Garamendi (2003) – Federal Authority
Apprendi v. New Jersey (2000) – Criminal Law
Arizona v. Evans (1995) – Criminal Law Freeing Public Schools to Test for Drug Use
Arthur Andersen v. United States (2005) – Business
AT&T Corporation v. Iowa Utilities Board (1999) – In Business – Consumer Cases Rulings for Both Sides
Babbitt v. Sweet Home (1995) – Federal Powers Revoking Gun-Free Zones and Term Limits
Bailey v. United States (1996) – Criminal Law Several Victories for the Government
Baker v. General Motors (1998) – State Courts
Barnett Bank v. Nelson (1996) – Business, Banking Savings and Loans Could Get Billions
Bartnicki v. Vopper (2001) – Speech & Press
Bates v. Dow AgroSciences LLC (2005) – Federalism
Bennett v. Spears (1997) – Environment
Board of County Commissioners v. Umbehr (1996) – Speech Politics, Ads and Indecency

Bond v. United States (2000) – Criminal Law
Bragdon v. Abbott (1998) – Discrimination
Brogan v. United States (1998) – Criminal Law
Brown v. Legal Foundation of Washington (2003) – Property Rights
Brown v. Pro Football Inc. (1996) – Workplace Pension Issues and Labor Law
Burlington Industries, Inc. v. Ellerth (1998) – Sexual Harassment
Bush v. Palm Beach County Canvassing Board (2001) – The Presidential Election
California Democratic Party v. Jones (2000) – First Amendment: Association
Castle Rock v. Gonzales (2005) – Criminal Law & Sentencing
Cedar Rapids v. Garrett (1999) – In Disability Cases, A Narrower Definition
Chandler v. Miller (1997) – Criminal Law
Cheney v. United States District Court (2004) – Jurisdiction
Chevron USA v. Echazabal (2002) – Workers & Bosses
Chicago v. Morales (1999) – On Criminal Law Issues, Some Reining In of Authority
Circuit City Stores v. Adams (2001) – Labor
City of Erie v. Pap's AM (2000) – First Amendment: Free Speech
Clark v. Martinez (2005) – Immigration
Cleveland v. Policy Management Systems (1999) – In Disability Cases, A Narrower Definition
Clinton v. Jones (1997) – Presidential Power
College Savings Bank v. Florida Prepaid (1999) – States Get Protection From an Array of Lawsuits
Connecticut v. Doe (2003) – Criminal Law
Crawford-El v. Britton (1998) – Discrimination
Crosby v. National Foreign Trade Council (2000) – Federalism
Cutter v. Wilkinson (2005) – Religion
Davis v. Monroe County (1999) – For the Harassed and the Poor, A Strengthening of Rights
Deck v. Missouri (2005) – Criminal Law & Sentencing
Desert Palace v. Costa (2003) – Equality
Dickerson v. United States (2000) – Criminal Law
Dura Pharmaceuticals Inc. v. Broudo (2005) – Business
Easley v. Cromartie (2001) – Civil Rights

Eastern Enterprises v. Apfel (1998) – Property
Eldred v. Ashcroft (2003) – Business
Equal Employment Opportunity Commission v. Waffle House (2002) – Workers & Bosses
F. Hoffman-LaRoche Ltd. v. Empagran S.A. (2004) – Jurisdiction
Faragher v. City of Boca Raton (1998) – Sexual Harassment
FDA v. Brown & Williamson (2000) – Federal Law & Regulation
Federal Communications Commission v. NextWave Personal Communications Inc. (2003) - Business
Federal Election Commission v. Beaumont (2003) – Free Speech
Federal Maritime Commission v. South Carolina Ports Authority (2002) – Property, Patients, Patents
Festo Corp. v. SMC Corp. (2002) – Property, Patients, Patents
Florida Prepaid v. College Savings Bank (1999) – States Get Protection From an Array of Lawsuits
Florida v. J.L. (2000) – Criminal Law
Friends of the Earth v. Laidlaw (2000) – Federal Law & Regulation
Gebser v. Lago Vista Independent School District (1998) – Sexual Harassment
General Dynamics Land Systems v. Cline (2004) – Discrimination
Glickman v. Wileman Bros. (1997) – Free Speech
Gonzaga University v. Doe (2002) – School & After School
Gonzales v. Raich (2005) – Federalism
Granholm v. Heald (2005) – Federalism
Greater New Orleans Broadcasting Association v. United States (1999) – Casinos and Voter Initiatives Win on Free Speech Grounds
Hill v. Colorado (2000) – Abortion
Hunt v. Cromartie (1999) – For the Harassed and the Poor, A Strengthening of Rights
Illinois v. Caballes (2005) – Criminal Law & Sentencing
Illinois v. Telemarketing Associates, Inc. (2003) – Free Speech
Immigration and Naturalization Service v. Aguirre (1999) – Immigration Cases Mean More Authority for Government
Indianapolis v. Edmund (2001) – Criminal Law
Jackson v. Birmingham Board of Education (2005) – Discrimination
Jaffee v. Redmond (1996) – Criminal Law Several Victories for

the Government
Jama v. Immigrations and Customs Enforcement (2005) – Immigration
Kansas v. Crane (2002) – Executions, Sex Offenders, Buses
Kentucky Association of Health Plans v. Miller (2003) – Business
Knowles v. Iowa (1999) – On Criminal Law Issues, Some Reining In of Authority
Kolstad v. American Dental Association (1999) – For the Harassed and the Poor, A Strengthening of Rights
Koon v. United States (1996) – Criminal Law Several Victories for the Government
Kumho Tire v. Carmichael (1999) – In Business – Consumer Cases Rulings for Both Sides
Kyles v. Whitley (1995) – Criminal Law Freeing Public Schools to Test for Drug Use
Legal Services Corporation v. Velazquez (2001) – Speech & Press
Leocal v. Ashcroft (2005) – Immigration
Lewis v. United States (1996) – Criminal Law Several Victories for the Government
Lingle v. Chevron USA Inc. (2005) – Property Rights
Lockheed v. Spink (1996) – Workplace Pension Issues and Labor Law
M.L.B. v. S.L.J. (1997) – Due Process
Maryland v. Wilson (1997) – Criminal Law
Matsushita v. Epstein (1996) – Business, Banking Savings and Loans Could Get Billions
McConnell v. Federal Election Commission (2004) – Politics
McKennon v. Nashville Banner (1995) – Discrimination A Stricter Standard For Affirmative Action
Medtronic v. Lohr (1996) – Speech Politics, Ads and Indecency
Metro-Goldyn-Mayer Studios v. Grokster Ltd. (2005) – Business
Metro-North v. Buckley (1997) – Liability
Mickens v. Taylor (2002) – Executions, Sex Offenders, Buses
Miller v. Albright (1998) – Discrimination
Miller v. French (2000) – Federal Law & Regulation
Minnesota v. Carter (1999) – On Criminal Law Issues, Some Reining In of Authority
Missouri v. Seibert (2004) – Criminal Law
Mosley v. V Secret Catalogue Inc. (2003) – Business
Murphy v. United Parcel Service (1999) – In Disability Cases, A

Narrower Definition
National Archives v. Favish (2004) – Privacy
National Cable & Telecommunications Association v. Brand X Internet Services (2005) – Business
National Credit Union Administration v. First National Bank & Trust Co. (1998) – Business
National Labor Relations Board v. Town and Country Electric (1996) – Workplace Pension Issues and Labor Law
National Railroad Passenger Corp. v. Morgan (2002) – Workers & Bosses
Nationsbank of North America v. Variable Annuity Life Insurance Co. (1995) – Business, Taxes Frequent Flier Contract Gets Cleared for Takeoff
New Jersey v. New York (1998) – Boundaries
New York Times v. Tasini (2001) – Speech & Press
Nguyen v. Immigrations and Naturalization Service (2001) – Immigration
Norfolk v. Western Railway Co. v. Ayers (2003) – Business
O'Connor v. Consolidated Coin Caterers (1996) – Discrimination A Wide Range of Bias Cases
O'Hare Truck Service v. City of Northlake (1996) – Speech Politics, Ads and Indecency
Ohio v. Robinette (1997) – Criminal Law
Olmstead v. L.C. (1999)
Oncale v. Sundowner Offshore Services (1998) – Sexual Harassment
Oritz v. Fireboard Corp. (1999) – In Business – Consumer Cases Rulings for Both Sides
Overton v. Bazzetta (2003) – Criminal Law
Owasso Independent School District v. Falvo (2002) – School & After School
Palazzo v. Rhode Island (2001) – Property Rights
Pegram v. Herdrich (2000) – Federal Law & Regulation
Pennsylvania Board of Probation v. Scott (1998) – Criminal Law
Pennsylvania State Police v. Suders (2004) – Discrimination
Pennsylvania v. Yeskey (1998) – Discrimination
PGA Tour v Martin (2001) – Civil Rights
Pharmaceutical Research and Manufacturers of America v. Walsh (2003) – Business
Phillips v. Washington Legal Foundation (1998) – Property

Plaut v. Spendthrift Farm (1995) – Federal Powers Revoking Gun-Free Zones and Term Limits
Printz v. United States (1997) – Constitutional Structure
Qualitex v. Jacobson Products (1995) – Business, Taxes Frequent Flier Contract Gets Cleared for Takeoff
Quality King Distrubtors v. L'Anza Research International (1998) – Business
Reeves v. Sanderson Plumbing Products (2000)
Reno v. American-Arab Anti-Discrimination Committee (1999) – Immi gration Cases Mean More Authority for Government
Reno v. Bossier Parish (2000) – Civil Rights
Reno v. Condon (2000) – Federalism
Republic of Austria v. Altmann (2004) – Jurisdiction
Richards v. Wisconsin (1997) – Criminal Law
Richardson v. McKnight (1997) – Liability
Rosenberger v. University of Virginia (1995) – Religion Separation of Church, State and Message
Rousey v. Jacoway (2005) – Business
Rush Prudential HMO Inc. v. Moran (2002) – Property, Patients, Patents
Scheidler v. National Organization for Women (2003) – Criminal Law
Schlup v. Delo (1995) – Criminal Law Freeing Public Schools to Test for Drug Use
Schneck v. Pro-Choice Network (1997) – Free Speech
Sell v. United States (2003) – Criminal Law
Smiley v. Citicorp (1996) – Business, Banking Savings and Loans Could Get Billions
Smith v. City of Jackson (2005) – Discrimination
Smith v. Doe (2003) – Criminal Law
Solid Waste Agency v. United States Army Corps of Engineers (2001) – Federal Authority
Sosa v. Alvarez-Machain (2004) – Jurisdiction
Spector v. Norwegian Cruise Line Ltd. (2005) – Discrimination
State Oil v. Khan (1998) – Business
Stogner v. California (2003) – Criminal Law
Sutton v. United Air Lines (1999) – In Disability Cases, A Narrower Definition
Thompson v. Western States Medical Center (2002) – Judges, the Web, the Front Door

Timmons v. Twin Cities Area New Party (1997) – Free Speech
Toyota Motor Manufacturing Inc. v. Williams (2002) – Workers & Bosses
Turner Broadcasting v. Federal Communications Commission (1997) – Free Speech
United States v. Alaska (1997) – Environment
United States v. Armstrong (1996) – Criminal Law Several Victories for the Government
United States v. Bajakajian (1998) – Criminal Law
United States v. Balsys (1998) – Criminal Law
United States v. Bean (2003) – Criminal Law
United States v. Bestfoods (1998) – Business
United States v. Booker (2005) – Criminal Law & Sentencing
United States v. Hubbell (2000) – Criminal Law
United States v. Locke (2000) – Federalism
United States v. National Treasury Employees Union (1995) – Speech No Raining on Somebody's Private Parade
United States v. O'Hagan (1997) – Securities Law
United States v. Oakland Cannabis Buyers' Cooperative (2001) – Federal Authority
United States v. Patane (2004) – Criminal Law
United States v. Scheffer (1998) – Criminal Law
United States v. Sun-diamond (1999) – On Criminal Law Issues, Some Reining In of Authority
United States v. Winstar (1996) – Business, Banking Savings and Loans Could Get Billions
United States v. X-Citment Video (1995) – Criminal Law Freeing Public Schools to Test for Drug Use
US Airways v. Barnett (2002) – Workers & Bosses
Varity Corporation v. Howe (1996) – Workplace Pension Issues and Labor Law
Verizon Communications Inc. v. Federal Communications Commission (2002) – Property, Patients, Patents
Virginia v. Hicks (2003) – Free Speech
Whitman v. American Trucking Associations (2001) – Federal Authority
Whren v. United States (1996) – Criminal Law Several Victories for the Government
Wilson v. Arkansas (1995) – Criminal Law Freeing Public Schools to Test for Drug Use

Wisconsin v. New York (1996) – Speech Politics, Ads and Indecency
Witte v. United States (1995) – Criminal Law Freeing Public Schools to Test for Drug Use

Cases in the Deference Article not included in the Linda Greenhouse Article(s)

Beard v. Banks (2004) – Habeas Corpus
Bell v. Cone (2002) – Habeas Corpus
Bogan v. Scott-Harris (1998) – 11th Amendment
Bracy v. Gramley (1997) – Habeas Corpus
Bradshaw v. Stumpf (2005) – Habeas Corpus
Brousseau v. Hagen (2005) – 4th Amendment - Search & Seizure
Brown v. Payton (2005) – Habeas Corpus
Bunting v. Mellen (2004) – 1st Amendment - Establishment Clause
Calderon v. Thompson (1998) – Habeas Corpus
Carlisle v. United States (1996) – 5th Amendment - Due Process
City of Chicago v. Morales (1999) – 14th Amendment - Due Process
Clay v. United States (2003) – Habeas Corpus
Clingman v. Beaver (2005) – 1st Amendment - Free Association
Colorado Republican Federal Campaign Commission v. Federal Election Commission (1996) – 1st Amendment - Free Speech
Cook v. Gralike (2001) – I/4 - Elections Clause
Dodd v. United States (2005) – Habeas Corpus
Dretke v. Haley (2004) – Habeas Corpus
Duncan v. Walker (2001) – Habeas Corpus
Early v. Packer (2003) – Habeas Corpus
Edwards v. Carpenter (2000) – Habeas Corpus
Federal Republic of Germany v. United States (1999) – Jurisdiction - Bill of Complaint (in a criminal case)
Gonzales v. Grosby (2005) – Habeas Corpus
Granholm v. Heald (2005) – I/8 - Commerce Clause
Gray v. Netherland (1996) – Habeas Corpus
Hohn v. United States (1998) – Habeas Corpus
Hope v. Pelzer (2002) – 8th Amendment - Cruel & Unusual Punishment
Idaho v. Coeur d'Alene Tribe (1997) – 11th Amendment

Johnson v. California – No. 04-6964 (2005) – 14th Amendment – Equal Protection
Khanh Phong Nguyen v. United States (2003) – Jurisdiction – Art. IV Judges (Criminal Case)
Kiowa Tribe of Oklahoma v. Manufacturing Tech. Inc. (1998) – 11th Amendment
McMillan v. Monroe County (1997) – 11th Amendment
Montana v. Egelhoff (1996) – 14th Amendment - Due Process
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